



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 358 of 2006

(From the original decision in Criminal Case No.5961 of 2005 in the Chief Magistrate's Court at Kibera – Ms. H. Wasilwa PM)

WALTER OGOLA OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

WALTER AGOLA OTIENO, the appellant, was convicted by the subordinate court of two counts. He was convicted of the offence of handling stolen property contrary to section 322 of the Penal Code. The particulars of this offence were that on 2nd August 2005, at Ongata Rongai Township in Kajiado District within Rift Valley Province, otherwise than in the course of robbery dishonestly received/retained one micro wave, full computer, three bed sheets and one water pump, all valued at Kshs.60,000/=. The appellant was also convicted of the offence of having in his possession suspected stolen property contrary to section 323 of the Penal Code. The particulars were that on 2nd August 2005 at Ongata Rongai Township in Kajiado District within Rift Valley Province, having been detained by No.58224 Pc Wambua as a result of exercise of powers conferred by section 26 of the Criminal Procedure Code, had in his possession, three rolls of copper wire, one TV aerial and one military jungle jacket, reasonably suspected to have been stolen or unlawfully obtained.

Being dissatisfied with the decision of the subordinate court, the appellant appealed to this court challenging both conviction and sentence. He also filed written submissions. At the hearing of the appeal, the appellant abandoned his appeal against conviction. He submitted that his appeal was now on sentence, as per his written submissions, which he relied upon. In his written submissions he stated that the sentence was harsh as he had contracted TB in prison, and that he had succumbed to pressure from peers to get rich quick, which was the reason why he committed the offences. He asked the court to accord him a second chance to become a productive member of society.

Learned State Counsel, Ms. Gateru, opposed the appeal on sentence. Counsel submitted that the 3 years concurrent sentences were neither harsh nor excessive.

I have considered the appeal and submissions of the appellant, as well as the submissions of the State Counsel. This is an appeal on sentence. Sentencing is the discretion of the sentencing court. An appellate court will be slow to interfere with the sentence unless it is shown that the sentencing court did not take into account a relevant factor, or that it took into account an irrelevant factor, or that it applied a wrong principle or short of these the sentence is so harsh and excessive that the application of a wrong

principle must be inferred.

The appellant herein was treated as a first offender. The maximum sentence for an offence under section 322 of the Penal Code is fourteen years imprisonment. The subordinate court sentenced the appellant to serve 3 years imprisonment. The maximum sentence for an offence under section 323 of the Penal Code is 2 years imprisonment in terms of section 36 of the Penal Code. The learned magistrate sentenced the appellant to serve 3 years imprisonment, which was an illegal sentence. I will have to regularize the illegal sentence.

Though the magistrate did not state exactly whether she took into account the mitigating factors before sentencing, the fact that she made the sentences concurrent, and that for an offence with a maximum sentence of 14 years imprisonment she imposed a sentence of 3 years, in my view, means that she took into account the mitigating factors. I do not think that the sentence on the alternative charge to count 1 was harsh or excessive. The sentence on count 3 was however illegal, harsh and excessive. I will therefore reduce the same.

Consequently, I order as follows:-

- 1. I uphold the sentence of 3 years imprisonment on the conviction on the charge under section 322 of the Penal Code.***
- 2. I quash the sentence on the charge under section 323 of the Penal Code, and substitute therefore a sentence of 1 year imprisonment.***
- 3. The sentences will run concurrently from the date on which he was sentenced by the subordinate court.***

It is so ordered.

Dated and delivered at Nairobi this 17th April, 2008.

George Dulu

Judge

In the presence of –

Appellant in person

Ms. Gateru for state

Mwangi – court clerk